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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 523.

REBECCA SWIDLER and SARA MILLER,
Petitioners,

—against—

KNOCKLONG CORP., GRESA REALTY CO., INC., and GRACE E. CONNOLLY,
Respondents.

BRIEF FOR RESPONDENT, GRESA REALTY CO., INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE ALPERT PRESS — TRIANGLE 5-1058-1059

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Opinions Below.

The opinion of the trial court (R. 333-334) is not officially reported. The Appellate Division, Second Department, State of New York, affirmed without opinion (R. 341-342, 345) and its decision is reported at 281 App. Div. 718. The opinion of the Court of Appeals, State of New York, is reported at 305 N. Y. 527, and its memorandum decision on the motion for reargument and to amend the remittitur is reported at 306 N. Y. 600.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition except that the Court's jurisdiction is invoked under 28 U. S. C. Sec. 1257(3).

Question Presented.

Whether the judgment below, which permitted a prior partition action judgment to validate a tax deed which had been obtained without notice to the owners, although the order for service by publication of the summons in the partition action dispensed with mailing the summons, constituted the taking of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

Statutes Involved.

The pertinent statutes are set forth in Appendix A to the petition at pages 19 to 21.

Statement.

This is a petition for a writ of certiorari to review a judgment of the New York Supreme Court, Nassau County, entered on a unanimous decision of the Court of Appeals of the State of New York which affirmed a judgment of the New York Supreme Court, Appellate Division, Second Department, affirming the trial court's judgment dismissing the complaint in an action brought to set aside a judgment of the County Court of Nassau County which vested title to real property in respondent Gresa's predecessor in title.

Respondents Knocklong and Connolly purchased a tax lien against the property in issue, and after the time for redemption of the lien had expired, received a deed, without notice to petitioners' predecessors, the owners of the property, from the County Treasurer (R. 214-217).

Thereafter, in a partition action brought in the Nassau County Court, in which petitioners' predecessors, the property owners up to the time of the default in taxes, were served by publication, with mailing of the summons dispensed with, a judgment was entered vesting title in Knocklong and Connolly (R. 302-307). Knocklong subsequently conveyed its interest to Connolly who in turn sold the property to Gresa for value, the present owner, subject to a purchase money mortgage in favor of Connolly (R. 326-331).

Service by publication, with mailing dispensed with, was ordered by the County Court in the partition action on the basis of affidavits on behalf of respondent Knocklong which described elaborate efforts to locate petitioners' predecessors, which stated that Knocklong's attorney had caused a search to be made of the Nassau County records and no record of any instrument affecting the title of the property, made by petitioners' predecessors, had been found, and which stated that deponents were unable with reasonable diligence to ascertain a place or places where petitioners' predecessors would probably receive matter transmitted to them through the Post Office (R. 221-239). The summons, complaint and lis pendens in the partition action were all filed on January 20, 1949 (R. 277-285). The affidavit of Knocklong's attorney was verified March 28, 1949 (R. 221-231).

The owners of the property prior to the tax default conveyed the property to one Leighton on January 21, 1949, after the lis pendens in the partition action had been filed. That deed to Leighton was recorded January 28, 1949 (R. 206-210). Leighton, by deed recorded February 21, 1949 conveyed to petitioners, nominal petitioners-plaintiffs here (R. 211). The real party petitioner here is the title insurance company which closed both the conveyance to Leighton and to the petitioners and which insured petitioners' title for the full purchase price (R. 580-581).

Thereafter, petitioners commenced this action to get an adjudication that the tax title to which respondent Gresa

succeeded is void. The trial court, the Appellate Division and the Court of Appeals all gave judgment for respondents on the ground that the judgment in the partition action was res adjudicata.

Argument.

This case involves conflicting claims of title to a small parcel of unimproved real property located in Nassau County, New York. Respondents assert as a bar to petitioners' claim a prior judgment against petitioners' predecessors. Petitioners argue, in effect, that the prior judgment in respondents' favor cannot bar petitioners here because the prior judgment, having been obtained after service upon petitioners' predecessors by publication, with mailing dispensed with, would then result in depriving petitioners of property without due process of law in violation of the Fourteenth Amendment of the Constitution. The issue therefore, is simply a question of the Constitutional validity of service of process which, on the facts here, was decided correctly below and which does not warrant review here.

I.

The Decision Below Is Clearly Correct.

It is settled that the prior judgment in the partition action will bar petitioners' interest in the property so long as the service upon petitioners' predecessors was valid. The only grounds urged by petitioners why the service might not be valid are (1.) that the order of the County Court of Nassau County permitting service by publication was improper because Knocklong's affidavit on which it was based was fraudulent, and (2.) that, in any event, service by publication with mailing dispensed with, under the facts here, deprives petitioners of property without due process. The decision below, in deciding these contentions adversely to petitioners, is clearly correct.

With respect to the affidavit forming the basis of the order for service by publication all courts below have examined petitioners' contentions fully and have held that there was no fraud and that the order directing service by publication was valid. The finding of no fraud below is, of course, a finding of fact supported by adequate evidence and will not be overturned by this Court without clear, unequivocal evidence that the finding is unwarranted.

In any event, the affidavit in question stated that Knocklong's attorney had caused the records of Nassau County to be searched and had found no record of any conveyances affecting the property in question. Respondents' position, which has been approved by all courts below, has been that the affidavit was speaking as of the date the lis pendens was filed which was before petitioners' predecessors attempted to convey the property and recorded a purported deed. Respondents' position is based on:

> (1) Filing a lis pendens in effect "closes the record" so that searches need not be continued beyond that date. Obviously, persons claiming an interest in the property will not, unless negligent, attempt to change the record title without discovering the lis pendens and making inquiries, and
>
> (2) The customary practice of continuing searches only to the date of the lis pendens is so well known that the County Court and others who may have relied upon Knocklong's attorney's affidavit were not misled (R. 1001).

In light of the role and purpose of a lis pendens and the common practice in real estate matters with respect to seraches respondents' position is a complete answer to charges of fraud. This is clearly so on this record where petitioners have not even attempted to sustain their burden of establishing fraud.

Similarly, petitioners' attack on due process grounds must also fail. The County Court directed service by publication with mailing dispensed with on the basis of affidavits on behalf of Knocklong detailing extraordinary efforts to locate petitioners' predecessors. Inquiries were made at the Post Offices of Lawrence, Cedarhurst and Woodmere (R. 225). Persons of similar name were contacted (R. 225-226). A judgment creditor was interviewed (R. 225). Nassau County records were searched (R. 225, 227). False leads to addresses in New York City were pursued (R. 234), all to no avail.

Accordingly, the County Court order directing service by publication contained a provision dispensing with the mailing of the summons to petitioners' predecessors because

> "* * * the Court being satisfied by the affidavits herein that the plaintiff does not know a place or places where the said defendants would probably receive matter transmitted through the Post Office * * *." (R. 221)

The provision dispensing with mailing was in accord with Secs. 232, 232-a, 232-b of the *New York Civil Practice Act*, Ch. 144 *Laws of New York* 1946, and Rule 50 *Rules of Civil Practice, Supreme Court, State of New York* (Appendix A to petition, pp. 19-21). Yet, petitioners' contention seems to be that the judgment entered thereon which bars their interest in the property and defeats this action, results in a violation of due process.

The test of adequate notice under the Constitution has been established by this Court in *Mullane* v. *Central Hanover Bank*, 339 U. S. 306, 70 S. Ct. 652, where it was said (p. 317):

> "This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it

> has been recognized that in the case of persons missing * * * employment of an indirect and even a probably futile means of notification is all the situation permits and creates no constitutional bar to a final decree foreclosing their rights.
>
> Those beneficiaries represented by appellant whose * * * whereabouts could not with due diligence be ascertained come clearly within this category * * *. However great the odds that publication will never reach the eyes of such * * * parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable."

The test, therefore, is a question of reasonableness. Were respondents' efforts here, under all the circumstances, all respondents could reasonably be expected to do to notify petitioners' predecessors? We submit that they were.

The affidavits presented to the County Court indicate that extensive investigation failed to turn up the petitioners' predecessors or their addresses (R. 221-239). Thus, mailing the summons would have been a futile gesture. Indeed, respondents would not have known how to address the envelope. It is believed that Constitutional requirements of notice do not require the doing of a meaningless thing.

Service by publication, in a proper case, is of course valid as a necessary evil, otherwise disputes and claims which involve absent or missing persons could never be resolved. Such service is no more harsh with respect to missing persons when the summons is not mailed, since the mail concededly will not be delivered. Accordingly, in this case service was valid and the decision below was correct.

One further fact with respect to notice to petitioners' predecessors of the County Court partition action. The lis pendens was filed January 20, 1949 (R. 275). Thereafter, but prior to the order directing service by publication, peti-

tioners' predecessors attempted to convey the property by deed recorded January 28, 1949 (R. 206-210). Petitioners themselves attempted to take title on February 21, 1949, also before the order for service by publication was granted (R. 211). Petitioners had the title searched before these conveyances and their agent, the title company, discovered but ignored the lis pendens and the prior tax sale (R. 583-586). Thus, petitioners must be charged with notice of the partition action and no amount of argument can lead to a conclusion that petitioners were deprived of property without due process because of inadequate notice.

II.

There Is No Important Question of Federal Law Warranting Review.

This action involves conflicting claims to real property. No governmental authority, on any level, is interested in its outcome either for tax or other purposes. The sole question here is simply whether petitioners had adequate notice of an earlier action the judgment in which now bars their claim here.

No conflict of decisions is urged by petitioners, nor is the constitutionality of the statutes which authorized the service by publication attacked. Petitioners merely say that under the facts here notice was insufficient.

The case therefore is a question of the analysis of the facts. We believe that the discussion above demonstrates that the courts below analyzed the facts properly and correctly concluded that notice to petitioners' predecessors was adequate under the guides set down by this Court. There is no need to again review the facts here, nor does this case warrant a restatement by the Court of the tests to be applied for adequate notice.

Conclusion.

Since the decision below is correct and since this case raises no important questions of federal law it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

EDWARD M. O. PRATT,
E. ROBERT PRATT,

Counsel for Respondent,
Gresa Realty Co., Inc.

Dated: February 1, 1954.

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JANUARY TERM, 1954

No. 523

REBECCA SWIDLER and SARA MILLER,

Petitioners,

against

KNOCKLONG CORP., GRESA REALTY CO. INC. and GRACE E. CONNOLLY,

Respondents.

BRIEF FOR GRACE E. CONNOLLY

PAUL J. LEACH,
Attorney for Respondent,
Grace E. Connolly,
Mineola, N. Y.

Dated: February 1, 1954.

In the

Supreme Court of the United States

January Term, 1954

No. 523

Rebecca Swidler and Sara Miller,

Petitioners,

against

Knocklong Corp., Gresa Realty Co. Inc. and Grace E. Connolly,

Respondents.

BRIEF FOR GRACE E. CONNOLLY

The petitioners claim that the proceedings in the prior partition action which resulted in a judgment that the defendants' tax title was valid, and barring the petitioners from any right, title and interest in the premises, did not constitute due process of law.

The defenses in the proceeding according to the petitioners were two:

First: That the judgment in the partition action could not validate an otherwise invalid tax deed.

Second: That, at any rate, no jurisdiction was obtained of the defendants in the partition action because mailing of the summons could not constitutionally be dispensed with, where service was made under an order for publication.

It is submitted that in neither case is there any constitutional question involved. As to the second, the propriety of the judge's action in dispensing with mailing depends on the facts disclosed by the affidavits. The affidavits in this case showed that a personal visit to every available address had been made, and that the defendants were not to be found at any of them.

The first claimed defense assumes that the tax deed was invalid. Both the statute (Section 5-57.1, Nassau County Administrative Code) and the state courts have held it was valid. If by the word "invalid," the petitioners mean the tax title was still subject to redemption because the heirs of Catherine Laffey had not been served with a notice of redemption, that was a justifiable issue, the correctness of which might be determined in any appropriate action.

Even if in a proper construction of the applicable state's statutes a partition action was not an appropriate form of action for the determination of that question (and of all the others of which it ultimately depends) nevertheless the error of state courts is one merely of construction and not of some constitutional vice in the statutes themselves.

Such a vice in the statute there could hardly be, since there is no requirement of due process which demands that rights of redemption, as distinguished from other interests in real property shall be determined by any particular kind of action.

CONCLUSION

The petition should be dismissed with costs.

Respectfully submitted,

PAUL J. LEACH,
Attorney for Respondent,
Grace E. Connolly,
Mineola, N. Y.

Dated: February 1, 1954.